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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Infrastructure Sharing	)	
Provisions in the Telecommunications	)	CC Docket No. 96-237
Act of 1996	)	
	)	

REPLY COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The comments overwhelmingly support the proposition that Sections 251 and 259 of the Act are separate and independent provisions, adopted for differing but complementary purposes. The Commission should reject any and all proposals to constrain Section 259 negotiations through reference to the provisions of Section 251. The Commission should similarly reject MCI and NCTA's proposals to constrain Section 259 negotiations through reference to the Commission's rules adopted in the Interconnection Order.

The comments also strongly support the Commission's proposal to establish a rebuttable presumption that entities meeting the definition of a "rural telephone company" qualify for infrastructure sharing. However, the Commission should reject AT&T's suggestion to alter the language of the Act and apply the determination of rural telephone company status at the holding company level. To spend $10 million dollars to serve 1000 customers is uneconomic, no matter who is doing the spending. Additionally, the comments demonstrate that "economies of scale or scope" are properly measured with respect to the production process at issue, not to the financial resources available to the company owning that process. Thus there is no statutory or policy basis for categorically excluding particular set of universal service providers.

Finally, the comments demonstrate that some clarification of Section 259(b)(6) is needed. That section provides that the Commission's regulations shall not require a PLEC to engage in infrastructure sharing where the QLEC will use the facilities to provide services to consumers in the PLEC's telephone exchange area. Section 259(b)(6) does not foreclose a QLEC from competing against the PLEC, it only provides that the QLEC may not use facilities or functions obtained under Section 259 negotiations to do so. PLECs may also elect to compete with QLECs while continuing to engage in infrastructure sharing. Indeed, the same parties may negotiate under Section 251 for some facilities, and under Section 259 for others.

Thus, Section 259 does not interfere with the development of competition and extensive rules are unnecessary to prevent Section 259 agreements from being anticompetitive. The Commission should adopt rules which permit free negotiations within the framework of the statutory language.

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The United States Telephone Association (USTA) respectfully submits its reply comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket.[1] USTA is the principal trade association of the exchange carrier industry.

USTA's reply comments address three issues raised in the initial comments: 1) the relationship of Section 251 to Section 259; 2) the definition of a qualifying carrier; 3) the terms and conditions of infrastructure sharing agreements - in particular the meaning of Section 259(b)(6) which provides that a providing local exchange carrier ("PLEC") may not be required to share infrastructure to be used by a qualifying local exchange carrier ("QLEC") to provide services or access in the PLEC's service area.

[1]Notice of Proposed Rulemaking, In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket 96-237, FCC 96-456 (released November 22, 1996)("Notice").

I. The Comments Overwhelmingly Support the Proposition that Sections 251 and 259 Are Separate and Independent Provisions

Nearly every commenter in this docket correctly begins with the premise that Section 259 is intended to promote universal service, and is distinct from Section 251. See, e.g., Comments of Frontier at 1-2; Comments of Rural Telephone Coalition (RTC) at 2; Comments of ALLTEL at 3; Comments of Southwestern Bell at 4. And no commenter disagrees with the premise that a QLEC which desires to obtain facilities from a PLEC can elect to proceed under either statutory provision, subject to each provision's purposes, limitations and requirements. See, e.g., Comments of MCI at 3; Comments of RTC at 5; Comments of Jackson, Thornton & Co. at 4; Comments of BellSouth at 4-5. Thus, parties generally agree that the two provisions are "complementary"- neither provision limits the other.[2]

Since Section 259 is not constrained by Section 251, negotiations under Section 259 should not be constrained by Section 251, or with any rules adopted thereunder, as proposed by MCI and NCTA. Numerous commenters caution the Commission not to adopt detailed rules and obligations, in order to preserve the parties' ability to negotiate freely. See, e.g., Comments of RTC at 11; Comments of Southwestern Bell at 13; Comments of USTA at 18. Yet MCI proposes that the Commission in fact constrain the parties' ability to negotiate, and to do so with

[2]As NYNEX points out, the term "complementary" means "serving to fill out or complete". Comments of NYNEX at 5, n.5 citing Webster's New Collegiate Dictionary.

reference to the access rules and pricing provisions adopted in the Interconnection Order.[3] Comments of MCI at 4. Similarly, NCTA argues that the Commission should hold that the scope of facilities made available to QLECs under Section 259 is no broader than the scope of facilities and functions made available under Section 251. Comments of NCTA at 4, n.13. These proposals to limit the terms or scope of Section 259 agreements are flawed in several respects, and should be rejected.

First, the Section 251 access rules and pricing provisions MCI proposes as a "baseline" for Section 259 negotiations have been stayed by an appellate court, and therefore should not be re-adopted in a separate Commission Order. Second, MCI and NCTA incorrectly presume an interrelationship between Section 251 and 259, and a responsibility of the Commission to determine or influence the outcome of negotiations, neither of which exists in the statute.[4] MCI states that by granting QLECs the advantage of negotiating terms "more favorable" than under Section 251, the Commission would be spared the task of explicitly determining the extent of additional or superior access to be made available to Section 259 carriers. Comments of MCI at 5. But Congress has already spared the Commission from that task.

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[3]First Report and Order, CC Docket 96-98, FCC 96-325 (August 8, 1996)("Interconnection Order").

[4]Moreover, MCI's proposal is unnecessary. As "telecommunications carriers," entities which qualify for infrastructure sharing also retain the option to negotiate under the competition provisions of Sections 251 and 252, including Section 252(I) which makes agreements negotiated under 251 available to other carriers. See 47 U.S.C. § 251, 252(I).

As USTA explained in its comments, Section 259 arrangements should be the product of negotiations between the parties, and that whether those arrangements meet the requirements of Section 259 is an independent inquiry governed only by reference to that Section. Comments of USTA at 3-7. Parties may negotiate arrangements under Section 259 without reference to what facilities, or what terms and conditions, are required to fulfill the obligations of Section 251. Also, by operation of Section 259(b)(3), PLEC's are not to be treated as common carriers for purposes of these agreements. Thus, a PLEC is not obligated to replicate the terms of any other agreement, whether negotiated under Section 251 or 259, for purposes of fulfilling a request under Section 259. Each agreement negotiated under Section 259 stands on its own.

In order to preserve this independence, many commenters correctly suggest that the Commission not require agreements newly negotiated under Section 259 to be reviewed under the standards of Section 251. See, e.g., Comments of Minnesota Independent Coalition at 2; Comments of BellSouth at 4, n.9; Comments of GTE at 9. And, as commenters point out, existing agreements which meet the obligations and provisions of Section 259 should not be subjected to the provisions of Sections 251 and 252. See, e.g., Comments of Minnesota Independent Coalition at 6; Comments of RTC at 13; Comments of NYNEX at 6 (Section 259 intended to "continue a historical relationship").

As the RTC correctly explains, the Commission has it backwards when it suggests that

Section 259 applies only to those agreements negotiated under that Section, while Sections 251 and 252 govern the universe of all other possible agreements. In fact, it is only Section 252(a) which contains any language of limitation, while Section 259 can plainly be read to encompass both agreements negotiated after enactment of Section 259 and agreements negotiated before enactment, which meet Section 259's requirements. Comments of RTC at 13; 47 U.S.C. § 252(a). As USTA explained in its comments, one purpose of the infrastructure sharing legislation was to "ensure continuation of the shared relationship among local exchange carriers," even where Congress also sought to introduce competition. See Comments of USTA at 2, n.2; Comments of RTC at 14.[5]

NCTA is wrong when it suggests that Section 259 must be re-written to support the principles of the Telecommunications Act. See Comments of NCTA at 4-7. NCTA's revisions would essentially write Section 259 out of the Act. As discussed above, NCTA proposes that the type of infrastructure, facilities, functions, information and technology available under Section 259 be limited to that available under Section 251. But NCTA also argues that QLECs may only proceed under Section 259 where they can show that the requested capabilities cannot be

[5]Moreover, it is entirely possible (and permissible) that some category of agreements between carriers could be negotiated without reference to either Section 251 or Section 259. LECs may have negotiated agreements with other LECs which do not meet the requirements of Section 259. These agreements should continue in force, provided they are not inconsistent with antitrust laws or the Communications Act. See also 47 U.S.C. § 252(a)(1) (Incumbent LEC may negotiate an agreement with a competing carrier without regard to Sections 251(b) and (c)).

obtained under Section 251, in order to promote competitive parity between QLECs and CLECs. Comments of NCTA at 5-6. Thus, in NCTA's view, Congress was either mistaken or unnecessarily redundant when it included Section 259 in the Communications Act. The Commission should reject this view and implement Section 259 in a manner which accords with Congressional intent.[6]

NCTA appears to believe that Congress intended that Section 259 must be constrained by Section 251 in order to ensure that rural LECs are not afforded any "special advantages" over rural cable companies entering the telephony market (presumably through Section 251) with regard to access to advanced network capabilities. Comments of NCTA at 3. This premise reflects a misunderstanding: Congress intend to afford unique treatment, distinct from Section 251, for QLECs who are subject to universal service obligations. See, e.g., 47 U.S.C. § 214 (particular obligations for carriers of last resort). While the terms of Section 259 agreements are not required to be "more favorable" than those of Section 251 agreements, they are also not

[6]Additionally, NCTA incorrectly suggests that infrastructure obtained by a QLEC under Section 259 must then be made available to requesting CLECs within the QLEC's market under Section 251. Comments of NCTA at 4. Facilities and functions obtained from other carriers are not within the scope of the network facilities required to be provided under Section 251. Comments of USTA at 17. Also, simply because a QLEC has obtained a facility or function from a PLEC does not mean that it is then "technically feasible" for the QLEC to provide that same facility as an unbundled network element under Section 251. In fact, it is unlikely that a QLEC could technically provide to others, particularly on a common carrier basis, a facility or function which it was unable to provide to itself. NCTA's concerns are addressed by the fact that its members are free to make Section 251 requests of the PLEC who owns the facility, or seek designation as an additional eligible carrier under Section 214. See 47 U.S.C. § 214(e)(2).

precluded from being so. The only limitations Congress intended to place on Section 259 agreements are those included in Section 259. To the extent that Section 259 provides any advantages, NCTA acknowledges that none of its members are precluded from qualifying to negotiate arrangements under Section 259. Comments of NCTA at 3, n.8.

II. The Comments Overwhelmingly Support Open Eligibility for Infrastructure Sharing, With a Rebuttable Presumption Established for Rural Telephone Companies

In the Notice, the Commission asked whether to adopt a rebuttable presumption that carriers whose operations are within the limitations set forth in the definition of "rural telephone company" in Section 3(37) of the Act, lack economies of scale or scope and thus qualify for infrastructure sharing. Notice, para. 37; see 47 U.S.C. § 153(37). A substantial number of commenters agree with this proposal, see, e.g., Comments of BellSouth at 6-7; Comments of AT&T at 3, and the Commission should adopt it in its Order.

Such a presumption however, should apply to all companies who meet the Act's definition of a "rural telephone company." The language of the Act should not be altered to be applied only at the holding company level, as suggested by AT&T. Comments of AT&T at 4. First, AT&T misreads the definition in 47 U.S.C. § 153(37),[7] and does not acknowledge that the

[7] The definition does not cover "carriers that serve communities fewer than 10,000, and that serve fewer than 50,000 access lines in a study area with fewer than 100,000 lines." Comments of AT&T at 4. A careful reading of the Act demonstrates that rural telephone companies include

Act examines "operating entities," not holding companies. Second, AT&T claims that entities that hold multiple telephone companies can recoup their investments in infrastructure from their subsidiaries' customers, and therefore have the opportunity to enjoy economies of scale and scope. Comments of AT&T at 5. But one need look no farther than MCI's Comments to see that AT&T misunderstands the economic principles governing economies of scale and scope.

As MCI notes, the economic concepts of economies of scale and scope are related to the production process at issue. While a holding company owning multiple telephone companies might be able to achieve economies with respect to obtaining capital for investment, economies in operating the network "are more likely to occur at the plant level." And these economies of financing may dwarf in comparison to the diseconomies faced by serving an isolated, small, rural community. Comments of MCI at 15. This analysis is correct: 1) economies of scale or scope are measured by the production process at issue, and 2) whether a carrier can finance a $10 million dollar facility or not, it is uneconomic to incur that expense to provide services to only 1000 customers. The Commission should reject AT&T's proposal to apply the rebuttable presumption at the holding company level.

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a carrier who serves <u>either</u> a study area with no community over 10,000 or an urbanized area <u>or</u> serves fewer than 50,000 lines <u>or</u> serves a <u>study area</u> with fewer than 100,000 lines, <u>or</u> has less than 15% of its lines in areas with more than 50,000 persons on the date of enactment. Most importantly, these four alternatives are applicable to LEC "operating entities," not holding companies. 47 U.S.C. § 153(37). The Commission should use the definition in the Act for its rebuttable presumption.

Based on the same economic principles described by MCI and others, the Commission should not categorically exclude any size or class of carriers from eligibility for infrastructure sharing. Many large telecommunications companies, including the RBOCs and GTE, serve as universal service providers to isolated, small, rural communities, and may lack economies of scale or scope with respect to the production process used to serve that area. As such, they are legally entitled to request negotiations under Section 259. See Comments of GTE at 10; Comments of MCI at 16 (non-rural carriers may obtain infrastructure sharing).

Only Frontier and NCTA suggest that the Commission should confine the availability of Section 259 arrangements. But neither NCTA or Frontier provides a legal basis for doing so. Frontier argues that additional regulation would "provide a logical starting point" to limit Section 259, which should be done because infrastructure sharing raises the potential for anticompetitive conduct or effect. Comments of Frontier at 3. As explained below in Section III, Frontier's premise is false: two or more carriers cannot insulate themselves from competition by entering into infrastructure sharing agreements.

NCTA argues that additional qualifications are necessary to effectuate the intent of Section 259 and promote administrative efficiency. Comments of NCTA at 3. But imposing new rules (which will be subject to waiver requests), and requiring each and every QLEC to show that it is "economically unreasonable" for them to deploy their own facilities is not administratively efficient. More importantly, re-writing Section 259 to limit its applicability further than provided for in the statute can hardly be said to effectuate its intent. The Commission should not even start down the dangerous road of denying carriers the ability to use Section 259 even though the carrier meets the qualifications enacted by Congress.

III. Infrastructure Sharing Arrangements Do Not Interfere With Competition

Both Frontier and ALTS argue that Section 259 could somehow operate to preclude competition between the two parties to the agreement. See Comments of Frontier at 3; Comments of ALTS at 4. But nothing in the Act or in USTA's proposals for infrastructure sharing contemplates this result. ALTS is correct in two limited respects: 1) there is no requirement that a QLEC and PLEC not compete in any respect in order to enter into an arrangement under Section 259, and 2) there is no fixed category of "non-competing companies." Comments of ALTS at 4-5. Section 259(b)(6) provides only that a QLEC may not compete with the PLEC using the facilities or functions obtained from the PLEC under Section 259. 47 U.S.C. § 259(b)(6); see Notice, para. 26. There is no limitation on other competition.

Should a QLEC desire to compete with a PLEC, it may do so, provided it utilizes only either its own facilities, facilities obtained from a third party,[8] or facilities obtained from the

[8]Of course, that third party may not be another QLEC who obtains the facilities from the PLEC with whom the original QLEC desires to compete. This prohibition is necessary to preserve the integrity of Section 259(b)(6). See Comments of USTA at 16-17; Comments of

PLEC through Section 251. As BellSouth explains, the existence of a Section 251 agreement between an incumbent LEC and a requesting carrier would not preclude the negotiation of a separate or more limited Section 259 agreement between the same carriers. Comments of BellSouth at 5. Thus, a QLEC may be using some facilities of the PLEC to compete, while using others to provide services within the territory in which it bears universal service obligations.[9]

However, ALTS is wrong when it argues that the provisioning of infrastructure by an incumbent under Section 259 demonstrates that it such services can and should also be made available for <u>any purpose</u> under Section 251. Comments of ALTS at 3. As discussed above, whether infrastructure must be made available under Section 251 is determined without reference to Section 259 or any agreements negotiated thereunder. Moreover, if the infrastructure provided under Section 259 may not be used to compete with the PLEC then it cannot be that the identical infrastructure must necessarily be made available on identical terms and conditions in order to compete with the PLEC. Such a result would eliminate any significance to Section 259(b)(6), and Section 259(b)(3) (PLEC may not be treated as a common carrier).

Of course, there will be situations in which the development of competition between

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RTC at 12.

[9]Thus, Section 259 only requires PLECs to offer infrastructure to QLECs for purposes of providing telecommunications or information services "in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under Section 214(e)." 47 U.S.C. § 259(a).

QLECs and PLECs necessitates a renegotiation of an infrastructure sharing agreement. As noted in USTA's initial comments, a PLEC may terminate an agreement in the event it discovers that the QLEC is offering or providing service in the PLEC's service area using the shared infrastructure. Notice, para. 27; Comments of USTA at 23. But QLECs are not precluded from offering competitive options in a PLEC's service area, nor are they precluded from obtaining facilities from the PLEC to do so. Section 259(b)(6) simply provides that they may not do so through infrastructure sharing.

Similarly, PLECs are not precluded by Section 259 or by any other provision of the Act from competing with QLECs.[10] Infrastructure sharing agreements will likely also address the duties and obligations of the parties should a PLEC desire to provide service in the area traditionally served by the QLEC, or can be successfully renegotiated in those circumstances. Other than to clarify the meaning of the Section 259(b)(6) limitation in these circumstances, no pre-emptive interference by the Commission is necessary.

As discussed by the RTC, while Section 259(b)(6) provides that a PLEC is not required to engage in infrastructure sharing for services to be offered in its "telephone exchange area," this provision originally intended to refer only to the PLEC's traditional service area. See Comments of RTC at 12. This is clear from an analysis of the plain language of the Act.

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[10]Of course, state commissions may regulate the extent to which certain carriers must offer interconnection, unbundled elements and resale. See 47 U.S.C. § 251(f).

Section 259(b)(6) provides that carriers "to which this section applies" are not required to engage in infrastructure sharing under certain circumstances. 47 U.S.C. § 259(b)(6). The carriers "to which this section applies," are identified in Section 259(a) as "incumbent local exchange carriers (as defined in Section 251(h))." See 47 U.S.C. §§ 259(a); 251(h). Section 251(h) makes clear that the obligations and rights of incumbent carriers do not travel with them outside of the telephone exchange areas identified in the Act.[11] Thus, a PLEC is only a "carrier to which this section applies" with respect to the area in which it is an incumbent LEC. Although the parties are free to renegotiate infrastructure sharing agreements at any time, a PLEC is not permitted by Section 259(b)(6) to terminate infrastructure sharing agreements by virtue of that PLEC's election to compete in the QLEC's service area.[12]

CONCLUSION

The initial comments demonstrate widespread support for the principle that the Commission should adopt rules which encourage cooperation under Section 259 and thus further that Section's goal of promoting universal service. Accordingly, the Commission should avoid interfering with Section 259 negotiations by adopting any limitations based on separate

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[11]Section 251(h) provides that a LEC is considered an "incumbent" only with respect to the area in which it provided service, and was deemed to be a member of NECA, on the date of enactment, see 47 U.S.C. § 251(h)(1), or where it is designated as an "incumbent" by Commission rule. 47 U.S.C. § 251(h)(2).

[12]The only exception to this principle would be if the PLEC were to be designated as an "incumbent" for territory within the QLEC's service area.

obligations and duties imposed on ILECs in Section 251. The Commission should avoid imposing any additional limitations on the class of carriers who qualify to request infrastructure sharing, but should facilitate negotiations by adopting the rebuttable presumption in favor of "rural telephone companies," as those companies are defined by the Act. And, the Commission should not impose regulations premised on concerns that Section 259 will limit competition.

Respectfully submitted,

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January 3, 1997

CERTIFICATE OF SERVICE

I, David L. Anderson, do certify that on January 3, 1997 Reply comments of the United States Telephone Association regarding Docket 96-237 were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

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